

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6174 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

CHETANKUMAR BHIKHUBHAI PRAJAPATI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 6174 of 2004
HL PATEL ADVOCATES for Petitioner No. 1-21
MR KP RAWAL, Ld. AGP for Respondent No. 1-4
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CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 02/02/2005

ORAL JUDGEMENT

1. Heard the learned Counsel appearing for the parties for final disposal of the matter.

2. Upon hearing Mr.Pandya, learned Counsel for the petitioners as well as Mr.K.P.Rawal, learned AGP for State authorities and Mr.Desai, learned Counsel for newly added respondent - Surat Municipal Corporation, applicant of Civil Application No.61/2005, it appears that there is no dispute on the point that the petitioners are granted lease for excavation of sand. However, the grievance of the petitioners is that there is no other alternative road available on land, for transportation of the sand from the place in question to any other places and, therefore, a kuchha bridge is constructed by making arrangement of 6 ft. dia pipes with a view to see that the water flow is not adversely affected. Mr.Pandya submitted that the inspection was also made by the Committee of Experts and as per the report submitted, the petitioners have made alteration and the petitioners are further ready to make alteration for the bridge in such a manner that it may not adversely affect the natural flow of water. However, he submitted that before such an action is undertaken, the District Collector by the impugned communication dated 21.5.2004 directed the petitioners to remove the bridge/pala and, therefore, under the circumstances the petitioners are constrained to approach before this Court. It has been submitted by Mr.Pandya, learned Counsel for the petitioners that for removal of any obstruction over any river, the power is that of State Government as per Section 12 of Bombay Irrigation Act, 1879 (hereinafter referred to as the "Irrigation Act") and the District Collector has no such power to direct for removal of such obstruction and, therefore, he submitted that the action is without any authority. He also submitted that the petitioners are using the said Pala by way of right of necessity, because there is no other way provided for continuing with the activity of lease granted in favour of the petitioners. He submitted that as no permission is required to be obtained or there is no legislation compelling the petitioners to obtain permission for such Pala, it cannot be said that the action of the petitioners of constructing the Pala which is as per his submission since 1990 is illegal. He also submitted that even if such obstruction is there and it is considered that the District Collector has such power to remove the obstruction, then also it is not necessary that in every case the District Collector should order to remove the obstruction, but he has to exercise the discretion and then to decide as to whether such obstruction should be removed or not. He further submitted that when the Experts opined that certain modifications will not hamper the natural flow of the water, the District Collector

ought not to have directed for removal of the Pala. Mr.Pandya also submitted that as such the decision of the Collector is not an independent decision, but is on the insistence of the business rivalry or Surat Municipal Corporation and, therefore, there is no independent application of mind by the Collector and the decision is arbitrary.

3. Mr.Pandya also submitted that there are such Palas which are in existence at Kadod and Shyampura. However, no decision is taken by the District Collector to remove such Palas, whereas in the case of the petitioners, Palas are ordered to be removed. He, therefore, submitted that the impugned communication directing the petitioners to remove the Pala is illegal, arbitrary, without authority and deserves to be quashed and set aside.

4. On behalf of the State Authorities, it has been submitted by Mr.Rawal, learned AGP that River Tapi is declared as notified river under Section 5 of the Irrigation Act. He submitted that, therefore, without there being any permission of the Competent Authority, no bridge/Pala or any way can be made by the petitioners. He also submitted that it is an admitted position that no permission is obtained by the petitioners for construction of such Pala/Bridge. Mr.Rawal further submitted that as per Condition No.6 of the lease deed without there being any permission of the District Collector, the petitioners could not have made use of any water way or could not have created any obstruction in the flow of the water. He submitted that Surat Municipal Corporation had intimated to the Superintendent Engineer, Irrigation Department, complaining about the obstruction for the flow of the water and had requested for removal of Pala and, therefore, ultimately the action is taken by the District Collector. He submitted that if the construction of Pala itself is without permission, the action on the part of the District Collector cannot be said to be illegal or arbitrary.

5. On behalf of the respondent Surat Municipal Corporation, Mr.Desai, learned Counsel submitted that as the difficulty was being faced by the Corporation in receiving sufficient quantity of water through its natural course in River Tapi, which is to be allotted to the residents of City of Surat, it was found by the Corporation that it was on account of such construction of Pala by the petitioners, it has affected the natural flow of water and, therefore, the complaint was made to the District Collector. Mr.Desai also submitted that

there will be applicability of Section 12 of the Irrigation Act only in a case where the lawful permission for construction of Pala is granted by the competent authority and not in a matter where the action is without permission and, therefore, he submitted the Collector has power and the petitioners should not be allowed to continue with the Pala which consequently results into adversely affecting the availability of the water to the residents of Surat City.

6. Having considered the above, it appears that is an admitted position that no permission whatsoever is obtained by the petitioners for construction of such pala. The photographs are produced by the petitioners at page 111 and 112 of the compilation which show that it is like a semi-check dam and the water level, as apparent from the photographs, is around 3 to 4 mtrs i.e. upto the thigh level of the person shown in the photograph at page No.111. So it would be not more than 4 to 5 ft. deep. If such is the situation the flow of water and even the water which is shown in the pipe of 6 ft. dia is about 1/2 of the size of the pipe and in between two pipes there appears to be a distance which can be said as creating obstacles to the natural flow of water.

7. Upon perusal of the photographs if this Court, as a prudent person, comes to the conclusion that such obstacle or hindrance would hamper the natural flow of water, more particularly when water level is only 3 to 5 ft. in the river, the complaint made by Surat Municipal Corporation that it is not getting sufficient quantity of water on account of construction of such pala by the petitioners cannot be said as without any basis. When the permission is not obtained by the petitioners and when the action of the petitioners is without there being any lawful authority for construction pala over the river, whose water is to be used for drinking purpose by the residents of Surat City, the petitioners cannot be head to say that the Collector has no authority to remove such obstruction and the only authority lies with the State Government.

8. Mr.Desai is right in submitting that the question of removal of obstruction in exercise of the power under Article 12 would arise in a case when such pala is created by lawful manner and is to be removed subsequently. If the very action from its inception is without there being any permission on the part of the petitioners, it cannot be said that only State Government can exercise such power under Section 12 and the Collector has no authority whatsoever to direct the

petitioners to remove such pala which creates obstacles or hindrance to natural flow of water. The attempt made on the part of the petitioners to contend that it is on account of right of necessity the petitioners have constructed the pala, in my view, cannot be accepted, because the petitioners themselves have stated that earlier the road was used from Village Bhairav, but as residents of Village Bhairav and Gram Panchayat objected to the grant of lease, the lease was not granted and it has been submitted that the residents of Village Bhairav are not permitting the transportation of the vehicles of the petitioners from that side and the same has required the petitioners to construct such pala. In normal circumstances, if one is to exploit the mine as per the lease deed or to use the minerals, it is for the lessee to make arrangement for such purpose. The right of necessity as sought to be canvassed by Mr.Pandya cannot be accepted, more particularly when it is a matter of claiming the right over the river where no way formerly was in existence and is now made by the construction of Pala i.e. a way created for transportation of the vehicles. The said aspect is coupled with the agreement of lease deed vide Condition No.6, inter alia, providing for not to undertake the activity without prior permission of the District Collector, Surat resulting into creating obstruction in the natural flow of water. When the lease has been granted expressly with the said condition the petitioners could not have constructed the pala which results into creating obstructions to the natural flow of water of the River Tapi without prior permission of the Competent Authority.

9. Mr.Pandya, learned Counsel for the petitioners made an attempt to submit that it is liberty, power and privilege to be exercised by the lessee as per condition No.6 and, therefore, he wanted to submit that such cannot be termed as restriction on the activity of the lessee while functioning as per the lease deed. I am afraid such contention can be accepted. When the condition itself expressly provides for not to interfere with the navigable stream or not to create any hindrance in water stream without prior permission of the State Government or the Collector as the case may be, liberty cannot be read as for construction pala, which results into creating obstacles and hindrance to the natural flow of water of river, that too, for the purpose of transportation of vehicles of the petitioners.

10. Under the above circumstances, when the petitioners have no right or authority under the law to construct such pala over the river Tapi, the petitioners

cannot be heard to say that as there is no way available or as they are not in a position to procure other way through land, even if there is no permission for such purpose, the right of necessity be read and this Court may interfere on the ground that the Collector has no authority under the Irrigation Act to give such direction. Therefore, the submission made on behalf of the petitioners for such purpose cannot be accepted.

11. It appears that Surat Municipal Corporation has drawn the attention of the Collector since it was finding difficulty in getting sufficient quantity of water through its natural flow and, therefore, the Collector ultimately has given such direction which is impugned in this petition. As such when the petitioners are not having any authority for construction of pala it cannot be said that the communication by the Collector directing the petitioners to remove the pala is unreasonable or arbitrary. Even while considering the said aspect if the District Collector has taken into consideration the complaint made by the Corporation for non-availability of sufficient quantity of water to the residents of Surat City and even if the Collector has taken such action on that basis, the decision of the Collector cannot be said to be on extraneous consideration, but rather can be said as in larger public interest with a view to ensure that water is made available as per its natural flow to the residents of Surat City. Therefore, I cannot accept the contention of Mr. Pandya that there is no application of mind by the Collector or that the Collector has not properly exercised the discretion.

12. So far as the opinion of the experts is concerned, if the matter is so examined by the expert and thereafter at the most the petitioners can press for grant of such permission, but such can be considered only after the Pala is removed and there is any expert opinion that any other arrangement may not cause hindrance to the natural flow of water. What could the other ways or what could be the other possibilities are for the concerned authority to opine and thereafter considering all the aspects the matter may be considered by the Collector, but not at this stage when the construction of Pala from its inception is without there being any authority. If such contention is accepted it would result into regularising the illegal activity on the part of the petitioners and consequently would result into encouraging the persons to commit illegality and the same this Court would not entertain in its discretionary jurisdiction while exercising power under Article 226 of the Constitution of India and, therefore, at this stage

the opinion of some of the experts upon which reliance was placed by Mr.Pandya cannot be accepted. If ultimately a case is made out before the Competent Authority on the basis of the opinion of the experts and if ultimately it is found by the competent authority that granting of such permission is not going to adversely affect larger public interest, including that of availability of water to Surat City and if the permission is granted, the matter may stand on a different footing but not at this stage when the direction is given for removal of pala, which itself is constructed without there being any lawful authority on the part of the petitioners.

13. In view of the above, I find that there is no merit in the petition and hence the same is dismissed. Rule discharged. Considering the facts and circumstances, there shall be no order as to costs.

14. Mr.Pandya, learned Counsel for the petitioners, after the pronouncement of the order, requests for suspending operation of the order for some time so as to enable the petitioners to approach before higher forum. As such the ad-interim relief was not extended from 5.10.2004 and when the Court considered the matter, there was no ad-interim relief in operation and as the matter is pertaining to creating obstacles and hindrance to the natural flow of water of a river, which is to be made available to the residents of Surat City, in normal circumstances, and I find that suspending the operation of the order is not to create any additional consequence since the ad-interim relief was not extended from 5.10.2004 and hence the said request of Mr.Pandya is rejected.

2.2.2005 (Jayant Patel, J.)

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